BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of: Ronald W., Claimant, and Westside Regional Center, Service Agency.	OAH No. 2010090027

DECISION

This matter came on for regularly scheduled hearing on February 28, August 23, 25 and 30, and September 26, 2011, at Culver City, California, before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. The Westside Regional Center (Service Agency) was represented by Lisa Basiri, Fair Hearing Coordinator. Claimant Ronald W. [1] was represented by Thomas E. Beltran, Attorney at Law.

Evidence was received by documents and testimony. The record was closed and the matter was submitted for decision on September 26, 2011.

ISSUE

The parties agreed that the following issue is to be resolved:

Is Claimant eligible to receive services from the Service Agency?

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. Claimant was born in February 1966, and is 45 years old. Claimant has applied

[1] Claimant is referred to in this way to protect his confidentiality.

to receive services from the Service Agency under the Lanterman Act.[2] He claims to be eligible because he has autism, mental retardation, or a condition closely related to mental retardation or autism or that requires treatment similar to that required for individuals with mental retardation or autism.

2. In a letter and Notice of Proposed Action dated August 5, 2010, the Service Agency denied eligibility, asserting that Claimant did not have a condition that made him eligible for services.

3. Claimant submitted a Fair Hearing Request dated August 28, 2010 (Exhibit 2), and this hearing ensued.

The law applicable to the determination of eligibility for services from a regional center

4(a). Various statutes and regulations relating to eligibility may apply to Claimant's request for services. Section 4512 states: "'Developmental disability' means a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." This last disabling condition is often referred to as the fifth category.

4(b). As relevant here, California Code of Regulations, title 17 (CCR), section 54000 defines "developmental disability" as a disability attributable to mental retardation or autism that originates before age 18, is likely to continue indefinitely, and constitutes a substantial disability. Excluded are handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or solely physical in nature.

4(c). These three exclusions from the definition of "developmental disability" under CCR section 54000 are further defined therein. Impaired intellectual or social functioning which originated as a result of a psychiatric disorder, if it was the individual's sole disorder, would not be considered a developmental disability. "Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have been seriously impaired as an integral manifestation of the disorder."

4(d). Nor would an individual be considered developmentally disabled whose only condition was a learning disability, described as "a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of

[2] The full name of this enactment is the Lanterman Developmental Disabilities Services Act. It is found at Welfare and Institutions Code section 4400 et seq. All statutory references are to the Welfare and Institutions Code unless noted otherwise.

generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss." Also excluded are solely physical conditions such as congenital anomalies or conditions acquired through disease, accident or faulty development, not associated with a neurological impairment.

5(a). Also useful are the following provisions of CCR section 54001:

"(a) 'Substantial disability' means:

"(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

"(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;
(B) Learning;
(C) Self-care;
(D) Mobility;
(E) Self-direction;
(F) Capacity for independent living;
(G) Economic self-sufficiency."

5(b). In CCR section 54002, the term "cognitive" is defined as "the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience."

6(a). In summary, Claimant contends that he suffers from mental retardation or autism and is eligible for services. Claimant also contends that he has a condition closely related to mental retardation or autism or that requires treatment similar to that required for individuals with mental retardation or autism that would make him eligible for Lanterman Act services.

6(b). The Service Agency contends that Claimant may have other conditions, including psychological disorders, learning disorders or other disorders, but does not have a diagnosis of either mental retardation or autism and is not eligible for services. The Service Agency also contends that Claimant is not eligible under the fifth category, which only refers to mental retardation and does not include any reference to autism.

<u>Important features of autism, mental retardation, and attention deficit hyperactivity</u>

7. A base level understanding of autism, mental retardation and other disorders will help place in context the evidence of Claimant's behaviors, test scores, evaluations and

diagnoses. The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association; also known as DSM-IV-TR) is a well respected and generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders. Exhibits 16, 17, 18, 19, and 20 contain copies of the pages relating to Autistic Disorder[3], mental retardation, Pervasive Developmental Disorder (PDD), Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS), and Asperger's Disorder. The DSM-IV-TR contains information on the diagnoses of these conditions that can assist in answering the eligibility issue in this case. It contains a list of diagnostic criteria for each condition.

8(a). According to the DSM-IV-TR, the features of autism are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests. It can differ greatly from person to person. There is no definitive test for it; rather, the list of symptoms and behaviors below is an attempt to collect and categorize the known features into a workable diagnostic reference tool.

8(b). To make a diagnosis of autism requires a review of 12 different symptoms or behaviors and a conclusion that at least six are present. These are more specifically set forth in Exhibit 16, the excerpt from the DSM-IV-TR on Autistic Disorder. In summary, the six or more symptoms or behaviors must include at least two of the four symptoms listed in section A1 (qualitative impairments in social interaction, which must be gross and sustained), at least one of the four symptoms listed in section A2 (qualitative impairments in communication, which must be marked and sustained and affect both verbal and nonverbal skills), and at least one of the four symptoms listed in section A3 (restricted, repetitive and stereotyped patterns of behavior, interests, and activities). Section B requires abnormal function in either social interaction, language used in social communication, or symbolic or imaginative play. Section C does not apply to this case. This Decision will discuss only those symptoms or behaviors that have relevance to Claimant. The DSM-IV-TR gives further explanations of these criteria, the significant aspects of which are summarized below.

8(c). In the section on differential diagnosis (differentiating autism from other disorders), it is noted in the DSM-IV-TR that any developmental abnormalities are usually noted within the first year of life. In differentiating autism from the proper diagnosis of mental retardation, it is noted that the latter has language impairment not associated with both the presence of qualitative impairment in social interaction and restricted, repetitive and stereotyped patterns of behavior.

9(a). The DSM-IV-TR contains information on the diagnosis of mental retardation which can assist in answering the eligibility issue in this case. The three essential criteria of mental retardation are: (1) significantly subaverage general intellectual functioning;

[3] The statute listing eligible conditions uses the word autism (see Factual Finding 4), while the DSM-IV-TR uses the phrase Autistic Disorder. For purposes of this Decision, they are interchangeable.

(2) accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety; and (3) the onset must occur before age 18. The DSM-IV-TR gives further explanations of these criteria (Exhibit 17), the significant aspects of which are summarized below.

9(b). The first criterion, general intellectual functioning, is defined by the intelligence quotient (IQ or equivalent), and assessed by use of one or more standardized tests. The level of "significantly subaverage," as required by this criterion, is defined as an IQ of 70 or below, with a standard measurement error of about five points in assessing IQ. For example, a Full Score IQ of 70 on one of the standardized tests is considered to represent a range of scores from 65 to 75.

9(c). The range of intelligence immediately above mild mental retardation (IQ 50-55 to approximately 70) is titled "borderline intellectual functioning," and has an IQ range generally of 71-84. Because an IQ score has a measurement error of plus or minus five points, it is possible to diagnose mental retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the second criterion. "Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information." (Exhibit 17.)

9(d). The second criterion, adaptive functioning, "refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." (Exhibit 17.) It can also be measured by various means that must be suited to accommodate any other disabilities the person may have (e.g., a blind person cannot be given a written test).

9(e). In the section on differential diagnosis (differentiating mental retardation from other disorders), it is noted in the DSM-IV-TR that, in those people with communication disorders alone, development in a specific area, such as expressive language, is impaired but there is no generalized impairment in intellectual development and adaptive functioning. It is noted that mental retardation often accompanies a pervasive developmental disorder. (In the DSM-IV-TR, autistic disorder is a pervasive developmental disorder.)

10(a). The DSM-IV-TR contains information on the diagnosis of attention deficit/hyperactivity disorder which can assist in answering the eligibility issue in this case. The disorder is characterized by a persistent pattern of inattention and hyperactivity/impulsivity that is frequent and more severe than in typical children. It must be present in at least two settings (e.g., home and school) and there must be clear evidence of interference with average social or academic functioning. The DSM-IV-TR discusses numerous examples of symptoms necessary to make the diagnosis as well as associated features.

10(b). In the section of the DSM-IV-TR on differential diagnosis (differentiating attention deficit/hyperactivity disorder from other disorders), it is noted that attention

deficit/hyperactivity disorder is not diagnosed if the symptoms occur exclusively during the course of a pervasive developmental disorder. (In the DSM-IV-TR, autistic disorder is a pervasive developmental disorder.)

Claimant's behaviors, assessments and diagnoses

11. Evidence of Claimant's symptoms and unusual behaviors were provided by interviews of caretakers, observation by evaluators, and Claimant's mother, both in her testimony and in summaries of her discussions with various doctors and evaluators found in their records, the earliest of which in evidence is from 1970, at age four and one-half, and the most recent from February 2011, some of which are summarized below.

12. Claimant was born in Ohio. Based on poor body tone and motor delays by age six months, Claimant's pediatrician referred him to an orthopedist, who reported that there were no orthopedic concerns but that it was possibly mental retardation. At age two and one-half, Claimant exhibited significant speech delays and, after a diagnostic assessment, he underwent intensive speech therapy starting at age three. The treatment was effective and Claimant's speech progressed. His mother was told that he was mentally retarded. At age four and one-half he was assessed by the Hamilton County Diagnostic Clinic which concluded he had mild mental retardation (Exhibit C-20). Claimant attended a special education preschool and a private preschool. In nursery school he was observed to have trouble sitting still, and by first grade he lagged behind his peers in social and intellectual functioning. The Hamilton County Diagnostic Clinic performed a psychological evaluation at age seven years, two months, when Claimant was in first grade. This evaluation was in May 1973 and the report (Exhibit C-18) noted that, in February 1971, Claimant was tested with the Stanford-Binet yielding an IQ of 114, and in April 1972 he was tested with the Kuhlman-Anderson yielding an IQ of 106. In May 1973 he was administered the Wechsler Intelligence Scale for Children (WISC) and scored a verbal IQ of 96, a performance IQ of 107, and a full-scale IQ of 101, with scatter in the verbal subtest scores. On the Peabody Picture Vocabulary Test (Peabody PVT) Claimant earned a mental age equivalent of seven years, 10 months, and an IQ of 108. On the Stanford-Binet he earned a mental age of six years, eight months. The report mentioned problems in fine motor skills, and possibly in concentration and short term memory. Results of the Wide Range Achievement test (WRAT) were: reading / word recognition, standard score 97, grade level 2.0; spelling, standard score 93, grade level 1.7; and arithmetic, standard score 96, grade level 1.9. On the Vineland Social Maturity Scale, Claimant earned an age equivalent of 7.4 years and a social quotient of 103. Staff psychologist George Vesparini, Ph.D., concluded that, although Claimant functioned in the borderline to low average range, the testing indicated he could function in the average to bright average range. His behavior, however, was immature with elements of restlessness and distractibility.

13. Also in May 1973 Claimant underwent a special education evaluation (Exhibit C-15), wherein it was recommended that he be placed in a small class designed for learning disabled children. A speech and hearing evaluation by the Hamilton County Diagnostic Clinic dated May 29, 1973 (Exhibit C-16) indicated that, although he was fidgety, he had made excellent progress in his speech and language development. Claimant's mother testified that

Claimant had received speech and language services five days per week during about two years of nursery school and about four days per week in preschool.

14. By grade two Claimant had been referred to a private school for children with learning disabilities. He also demonstrated hyperactivity, impulsivity, lack of attention, and lack of awareness for personal space (he would hug peers impulsively and would not keep his hands to himself). In third grade Claimant was prescribed Ritalin, which was somewhat helpful in containing his hyperactive behavior.

15. A portion of a report on diagnosis and recommendations from the Hamilton County Diagnostic Clinic references a counseling interview with Claimant's parents on June 15, 1973 (Exhibit C-17), at the end of his year in first grade. The prior testing was reviewed including references to Claimant being distractible, perseverative, and poorly focused. The author commented that Claimant's mother was defensive and did not expect much of him, that Claimant was being indulged, was beginning to internalize feelings of "being not good," and he would "disintegrate" at times of anxiety. It was recommended that Claimant stay in his present school with individualized help and limits on distractions and receive psychiatric therapy. There are portions missing from this report.

16. Standardized testing was reported by the Springer Educational Foundation in February and March 1974 (Exhibit C-14). Of significance, it was extremely difficult to hold Claimant's attention to the tasks at hand. Claimant's visual motor integration was below his chronological age by one year, two months. His visual perception results were below age equivalence in areas indicating poor visual-motor coordination, inattentiveness and disorganization, but above age equivalence in other subtests that were not explained. His verbal intelligence score of 97 on the Peabody PVT placed him three months below his chronological age. On the WRAT, his grade expectancy was 2.5, and his reading grade equivalent was 2.5, spelling grade equivalent was 1.8, and arithmetic grade equivalent was 2.5.

17. A diagnostic classroom observation occurred in February and March 1974 (Exhibit 20), which indicated that Claimant had an engaging personality and a fertile imagination. His distractibility was noted, and that he related well to other students and adult volunteers. Reading, phonics, spelling and arithmetic seemed adequate to his grade and age level, although there were some problems in writing.

18. A psychological services report of the Hamilton County Office of Education (undated; Exhibit C-19) indicated that a WISC-Revised was administered in March 1975, when Claimant was age nine years, two months, which yielded a visual IQ of 92, a performance IQ of 106, and a full-scale IQ of 99, indicating functioning within the average range of intelligence. The Bender-Gestalt test results of visual motor perception showed adequate development, and the Draw-a-Person Test results indicated Claimant's intellectual maturity was lower than what was expected and not commensurate with his measured mental ability.

19. Claimant's family moved to Wyoming, Ohio in part because they considered the special education services to be a good fit for Claimant, and he started in fifth grade. Claimant's mother reported that he attended a middle school for students with learning

disorders for two years. He did not do well in school and did not deal well with the other students. He would often converse only when the topic pertained to his restricted interest in movies. Although he attended high school football games, he went alone. A high school counselor informed Claimant's mother that Claimant may be depressed as a result of social difficulties.

20. In November 1983 Claimant was assessed by Jewish Vocational Services (JVS) for work competencies and college potential. The report (Exhibit C-13) appears incomplete and indicated that Claimant had limited work experience in his father's shoe company but did not want to continue. He had no specific vocational direction and was assessed as "immature, unsophisticated in reference to the world of work," and could benefit from a transitional work adjustment program that JVS could provide. Due to Claimant's limited academic capabilities it was suggested that it was not realistic to recommend even a modified college program.

21. Exhibit C-12 contains some grading worksheets for a WRAT and Woodcock Reading Mastery tests administered to Claimant in May 1984 when he was 18 years old and in the 12th grade in Wyoming, Ohio. However, there is no report or other evidence to explain the significance of this document.

22. After high school, Claimant enrolled in Wright State University because his parents discovered there was a good learning disabilities program, but Claimant did not do well and would not ask for help. A friend of his parents recommended the Riverview School in Cape Cod, Massachusetts, a boarding school that specializes in helping adolescents and young adults with language, learning, and cognitive disabilities. The program helped him develop independent living skills. When Claimant applied to a post-secondary program for learning disabled students he was required to undergo a psychological evaluation, the report of which is dated April 16, 1985 (Exhibit C-11), when Claimant was age 19 years, 2 months. Tests were administered and interpreted, as summarized here. On the Wechsler Adult Intelligence Scale-Revised (WAIS-R), Claimant was assigned a verbal IQ of 87, a performance IQ of 118, and a full scale IQ of 101. The evaluators noted the results placed Claimant's overall intellectual functioning in the average range however the 31 point discrepancy between the verbal and performance scores was highly unusual. His areas of strong performance included manual skills like hand-eye coordination, social knowledge and fine motor control, and yet poor performance was noted for other areas of motor control and/or attention problems. The verbal subtests, along with results from the Peabody PVT, were indicative of learning disabilities in language arts skills. On the WRAT-Revised, his reading and spelling scores were within the average age for his age group but his mathematics score was in the low average range. The evaluators suggested that results of these three tests were suggestive of a learning disability involving sequential cognitive processing skills, but were not suggestive of someone with attention problems. Occupational interest testing results indicated that Claimant had a poor self-image of expectations of future job success, although the intelligence test results suggested that, with proper training, he could perform satisfactorily in work settings. Although Claimant showed an ostensibly cheerful exterior, there was evidence of underlying depression and anxiety. He showed a strong interest in close interpersonal relationships but harbored a well-contained inner turmoil which he claimed to release by attending horror or adventure movies.

Recommendations included vocational counseling, weekly counseling, and the statement that Claimant had "very good social skills" and could function well in most social environments like a college campus or training facility.

23. Claimant then attended the Career Apprenticeship Program at the Riverview School in Massachusetts, where his mother hoped he would learn to live away from the family but with supports and structure. He was in a group home setting and worked as a salesman at a kiosk in a mall. However, in December 1987, he stole money from another student. A series of letters (Exhibits C-22, C-23, C-24 and C-25) indicate that Claimant had progressed well, notably in his work ethic and attitude, and was able to manage and save money. However, he stole $470 over a several week period by making several trips to a bank and withdrawing $40-$50 each time, which indicated pre-planning and a lack of impulsivity. Claimant's parents and the school responded with a multiple-step plan including apologies, counseling, changed living arrangements and monitoring. By June 1988, Claimant had decided to withdraw from the program, despite recommendations from his parents and the school that he complete it. He had been perceived as indifferent to peers in the program due to an inability to be sensitive to other's needs and a preoccupation with meeting his own needs. It was unclear to what extent the theft resulted in action by the police or the courts; however, Claimant was required to do community service, and the program coordinator wrote in August 1988 (Exhibit C-21) that, although Claimant's attendance was good, his attitude was very poor until he realized he would be returning to Cincinnati.

24. Claimant's family had already returned to Cincinnati and he joined them. He worked for a playing card manufacturing company for a number of years, and also had a job in a warehouse. There was little specific evidence covering this period, other than Claimant's brother had lived in Torrance, California for some time and started a family, and Claimant's mother and father moved to California and his father started a business in California, so Claimant moved to the Los Angeles area in 1991. Claimant's father helped get him a job at Universal Studios and Claimant performed well. The family sought assistance from the Independence Center in West Los Angeles, which provided residential and counseling services to help Claimant. Claimant's father died in 1992. Claimant's mother believes that Claimant became fixated on the female counselor who told him of his father's death. Claimant stalked her and punctured her car tires. In October 1992, Claimant broke into the counselor's apartment and was subsequently jailed for about nine months. Because the victim still lived in the area and the court was hesitant to release Claimant into the area, the family arranged for him to go to a program in Ohio.

25. The Harding Hospital in Ohio wrote to the court in July 1993 (Exhibit C-9), explaining its history and programs of mental health care and providing a treatment plan for Claimant. Harding Hospital did a Neuropsychological Evaluation in September and October 1993 (Exhibit C-8), where his score on the WAIS-R was verbal IQ 81/83, performance IQ 108, full scale IQ 91. Again the discrepancy between verbal and performance scores was noted. His verbal abilities were uneven, and the evaluator noted that Claimant may produce words and speak at a normal pace but his communication may be marked by odd phrasing and inaccurate word usage. Memory skills were in the range of moderate to severe impairment, with particular

note that when he was not interested in information he could not focus on retaining it. Abstract reasoning skills were uneven, with the note that he had a "surprisingly strong ability to grasp the logical sequencing of events in a social setting," but also difficulty in grasping abstract concepts, rigidity in his approach to ambiguous tasks, and difficulty viewing a problem from several perspectives. He had attentional difficulties and often lost focus or became distracted, and perseverated on an unsuccessful approach. He would act impulsively. Claimant was likely to confuse, distort or miss a good deal of information given to him. It was recommended that he be instructed using short, small bits of information, with much repetition and requests for him to repeat back the information, as well as visual aids and notes to play to his strengths and compensate for poor memory. Although he may respond appropriately in a social situation, he also displayed poor judgment and would likely persist in maladaptive behaviors without appreciation of the consequences. He would benefit from explicit rules of behavior.

26. Harding Hospital did a Psychological Evaluation in November 1993 (Exhibit C-7), the focus of which was to administer tests, analyze available data (including the Neuropsychological Evaluation report) and give recommendations for those who would be treating Claimant. Of significance, staff psychologist Theresa Diserio, Ph.D., noted that when Claimant was faced with a situation he didn't understand, his level of functioning plummeted, he lacked impulse control, and he had a tendency toward delusional thinking centered on his wish to be an object of admiration. His view of human interactions was based mainly on a need to compete with or dominate others, although he did not expect to prevail. Nevertheless, he engaged in grandiose fantasies and adopted the role of the aggressor, particularly with females, in whom he perceived the opportunity for romance. Due to weak verbal skills, Claimant was more likely to react with impulsive actions than with words. Dr. Diserio anticipated difficulty by therapists in establishing a therapeutic relationship with Claimant, strongly counseled against assigning any female therapists, and gave recommendations for the approaches of consistency and control that would be most effective.

27. Claimant's mother stated that he was in a locked ward at Harding Hospital for about one and one-half months and then in a halfway house on the hospital grounds for another six months. When Harding Hospital expressed that Claimant did not need the level of mental health services that they provided, Claimant's family found another placement at the Devereux program in Pennsylvania.

28. Respondent was in treatment programs at Devereux for about two years, first in a residential treatment program from October 1994 to March 1995 and then he transferred to a transitional apartment living program. A letter from Devereux in September 1995 (Exhibit 9) noted he received residential, vocational and clinical services as well as his consistent improvement and excellent performance. At the completion of his court probation he was convicted of the reduced charge of misdemeanor possession of stolen property.

29. Claimant wanted to live in Columbus, Ohio, and he moved there. His mother was living in Cincinnati and would visit him every weekend. She helped him with shopping and other tasks. Claimant's expenses were being paid from a trust established by his father. Claimant was working at a Toys R Us store. Claimant's mother arranged for supervisors to

assist Claimant. After about six months or a year, Claimant had formed an attachment to a female supervisor at his work and he was arrested for stalking her. With the help of a lawyer retained by Claimant's mother, no charges were filed because Claimant agreed to move from Columbus. In 1998 he moved in with his mother in Cincinnati, and later into his own apartment. He had jobs in factories, and sometimes through a temporary employment agency. Although Claimant's mother stated that he was good at work routines and liked to work, apparently he was unable to obtain steady, continuing employment. Claimant obtained counseling from Anthony Barone, Ed.D., who he first contacted in November 1998. Dr. Barone diagnosed him with Attention Deficit Disorder and non-specific learning disabilities, which he found as interfering with Claimant's ability to find and keep jobs. Claimant attended counseling with Dr. Barone through February 2005. In September 2006, Dr. Barone wrote a letter to an agency in Cincinnati recommending vocational counseling, and in August 2008 he wrote a letter (Exhibit C-6) to the Devereux Foundation in Santa Barbara recommending placement for Claimant.

30. Claimant's mother had been splitting her time between Cincinnati and Florida. She was concerned that she was not available enough to assist and monitor Claimant's behavior and living situation. She had decided to move to Southern California to be closer to her other son and purchased a condominium in Pasadena. She wanted Claimant to move, too. She found an apartment for him in Santa Barbara and engaged the Devereux program to provide supervision and support services, to assist Claimant to find a job, get acclimated to the area, and help find social events. Devereux provided 15 to 20 hours per week of services. Claimant's mother strongly suggested that only male staff members be assigned, but there was a shortage of staff and a female supervisor was assigned. Claimant was seen near her residence, and had slashed her tires. Charges were pending and Claimant's mother retained a lawyer, who was able to arrange a disposition that required Claimant to move from Santa Barbara.

31(a). For purposes of advising his lawyer and the court, a psychological evaluation was prepared by John Lewis, Ph.D., dated September 3, 2009 (Exhibit C-3). Dr. Lewis had evaluated Claimant on August 14 and 21, 2009, interviewed Claimant's mother and two caretakers from Devereux, reviewed records, and interviewed Claimant and administered various tests.

31(b). Dr. Lewis collected relevant background information and took a developmental history, a vocational history, an interpersonal history, legal history, medical history, and listed hobbies and interests, activities of daily living, and made behavioral observations. The following comments were of note. The reason for referral was that Claimant had difficulties maintaining appropriate boundaries with a female counselor from Devereux, was suspected of following her home and slashing her tires, and it was possible that legal action would be taken. Dr. Lewis was asked for Claimant's diagnostic status and treatment needs in this context.

31(c). Relying on information from Claimant, Dr. Lewis believed that he had not been formally assessed since childhood. Devereux obtained "sparse records" from his prior mental health providers. Claimant's diagnosis on admission to Devereux in 2008 was Attention Deficit/Hyperactivity Disorder. Dr. Lewis was aware of Claimant's early developmental

history. Claimant's mother reported that, although Claimant had developed independent living skills by adolescence, he had difficulty making and maintaining social relationships. Claimant told him that he recalled feeling unhappy during the year he spent at Riverview and he found the curriculum to be too easy. Claimant reported he was unable to find jobs in Santa Barbara due to the bad economy and limited jobs for which he was qualified, although others reported he made very little effort to find work. Although Claimant described maintaining contact with a large number of friends, including diligently sending greeting cards for anniversaries and occasions, his mother described this as an obsession. Claimant has hundreds of cards that are preaddressed, far in advance and often only contain his stamped name. The recipients are often only acquainted with Claimant (such as high school classmates), and do not respond to these cards. He reported he has not had a best friend or a girlfriend since high school. Although the Devereux staff tried to get him to attend social events with others, he perceived himself as higher functioning than his peers. Devereux staff commented that Claimant has difficulty picking up social cues.

31(d). Claimant described his interests and hobbies as focused on movies. He goes with family members or alone, watches on television and the internet, and tracks information on websites. Although he was also interested in video arcades and miniature golf, he had not found these in the Santa Barbara area. He mentioned his greeting cards, as well as collecting souvenir plastic skulls from a Spencer's store. His mother stated Claimant was very particular about the types of plastic skulls.

31(e). Claimant explained his activities of daily living to Dr. Lewis who, upon consulting Devereux staff, learned that Claimant overstated his abilities and needs prompting for hygiene and dressing. Although Claimant drove a car, he paid little attention to pedestrians, his driving skills were poor, and he had a history of license suspension for poor driving.

31(f). Dr. Lewis observed that Claimant often maintained eye contact and seemed to understand what was said to him. Although he responded to the topic at hand, there were moments when he'd direct the conversation to his idiosyncratic interests. He'd veer off topic, did not pick up clues to refocus, and had notable deficits in attention. Claimant demonstrated little in the way of social reciprocity.

31(g). Dr. Lewis administered the WAIS-IV, yielding a full scale IQ of 79, indicating intellectual ability in the low average to borderline range. Perceptual reasoning was relatively more developed, in the average range; verbal comprehension was in the low average range; working memory was in the borderline range; and lowest was processing speed, also in the borderline range. Based on the WAIS-IV results, Dr. Lewis concluded that Claimant would not be diagnosed with mental retardation, and the results were more consistent with Autistic Disorder than with Asperger's Disorder due to Claimant's relatively greater perceptual reasoning outcomes versus his verbal comprehension skills. Dr. Lewis noted Claimant's deficits with regards to attention, working memory, and verbal comprehension, all of which are skills that play important roles in independent functioning and social interaction, and which may be less noticeable due to his well developed vocabulary and verbal articulation.

31(h). Dr. Lewis administered the Personality Assessment Inventory (PAI) and noted that there was no indication of any clinically significant distress, although minor distress was noted related to lack of employment and of social opportunities. Dr. Lewis noted that Claimant's stated interests are more on par with that of an adolescent male than a middle aged man and that Claimant seemed unaware of how others perceive him. Claimant did not seem to understand that he experiences significant cognitive and interpersonal deficits; however he had developed sufficient coping skills to facilitate adjustment to his new situation in Santa Barbara.

31(i). Dr. Lewis concluded that Claimant presented with symptoms of both autism and Asperger' Disorder, except that people with Asperger's do not experience significant delays in language development. Claimant's speech was markedly delayed and only developed after age three due to an intensive treatment program. He found the following autism symptoms: impaired social interaction, including a failure to develop peer relationships appropriate to one's developmental level as well as a lack of social and emotional reciprocity; impaired communication, in the form of a delay in spoken language development; and restricted repetitive and stereotyped behavioral patterns, interests, and activities. Further, the WAIS-IV scores were more consistent with autism than with Asperger' Disorder. Claimant functioned at a higher level than many autistic individuals. Dr. Lewis was aware of earlier diagnoses of Attention Deficit/Hyperactivity Activity Disorder or Learning Disabilities, but concluded that Claimant's deficits were accounted for by the diagnosis of autism.

31(j). Dr. Lewis made several recommendations including, among others, treatment should focus on the gaps in Claimant's activities of daily living, including ongoing and consistent feedback from others before he could develop the ability to self-correct. Claimant required social skills treatment aimed at improving his understanding of interpersonal relationships, and would likely respond best when information was communicated in concrete and practical terms, short sentences, and time limited sessions. To increase motivation and the ability to develop new skills, those working with him should be positive and have an optimistic manner, and staff and family should provide praise and positive reinforcement when he is observed demonstrating new learning. Boundary issues should be addressed by feedback to Claimant in a firm but respectful manner and should be a focus of his treatment, via written contracts and ongoing discussion. Claimant should receive individual psychotherapy, ideally from a male therapist familiar with developmental disabilities and social skills deficits training. Finally, Claimant might qualify for vocational assistance from the Department of Rehabilitation, with the suggestion that any prospective employer be informed of Claimant's social skill deficits and provide feedback to his treatment providers regarding his progress.

31(k). Dr. Lewis did not testify at the hearing. However, by virtue of his training, education and experience as set forth in his curriculum vitae (Exhibit C-29), he is qualified to provide an expert opinion. Although he does not appear to have a specialty relating to autism or developmental disabilities, he has sufficient background in performing psychological assessments.

32(a). In December 2009 Claimant's mother contacted Bruce Gale, Ph.D., at the suggestion of Claimant's attorney, to provide an assessment and address the issue of whether

Claimant suffered from any condition such that he would be better served by diversion or probation instead of jail. Dr. Gale testified that Claimant's mother was a bit desperate over the situation and that, even though he had been in a recent serious accident and was limiting his practice, he decided to see Claimant. Dr. Gale spent 8.5 hours over three days in late December assessing Claimant, including interviews of him and his mother, administration of tests, and review of prior reports. By virtue of his training, education and experience as set forth in his curriculum vitae (Exhibit C-27) and his testimony, he is qualified to provide an expert opinion. Dr. Gale has experience performing psychological assessments to determine the existence of psychological disorders and developmental disabilities, although he stated he does not specialize in the subject of certain measures used to diagnose autism.

32(b). Dr. Gale's initial report is dated January 25, 2010 (Exhibit 6). (Although there is an earlier version dated January 20, 2010, it contained some errors that were then corrected.) The report includes a brief section of relevant history and indicates Dr. Gale reviewed reports and evaluations by Springer Educational Foundation (see Finding 16), Harding Hospital (see Finding 26), and Dr. Lewis (see Finding 31). Dr. Gale decided that, for his initial interview, he would not repeat the in-office process that had been done many times, but rather walked with Claimant around the community to see his behavior around others and his general level of awareness. Dr. Gale's report contains numerous examples of interactions and dialogue during this and subsequent interviews and testing, most of which will not be repeated here but which provide support for his diagnostic impressions and conclusions. After discussion of friendships, Dr. Gale wrote that Claimant exhibited a disconnected, fantasy-based thinking in describing some social encounters, and that his most meaningful relationships were with family members.

32(c). Dr. Gale administered the Woodcock-Johnson III Tests of Cognitive Abilities, yielding a score of 86 (age equivalent 11 years old), which was slightly higher than the standard score of 79 obtained by Dr. Lewis from the WAIS-IV. Both tests are valid measures and the results correspond to the low average range of cognitive functioning.

32(d). Dr. Gale agreed with many of Dr. Lewis's findings and conclusions. Dr. Gale found Claimant's thinking abilities in the low average range and noted this was nearly one standard deviation from his verbal skills. Dr. Gale found that Claimant's ability to perform tasks that required learning of new visual and auditory information was significantly impaired. Memory skills also showed signs of impairment, and his ability to recall details of oral stories yielded scores in the range of mild developmental delay. This is more impairment than would be expected considering Claimant's cognitive functioning and verbal abilities, and suggests he needs special supports to learn and remember information that is presented verbally. Dr. Gale concluded that Claimant could communicate successfully on topics with which he was familiar and interested. His communication, however, was severely impaired in subjects outside these parameters.

32(e). Dr. Gale noted that the test of personality functioning that he used, the Millon Clinical Multiaxial Inventory-III (MCMI-III), as well as the measure used by Dr. Lewis (the PAI), was not ideal for people who function near the range of mental retardation or autism. Nevertheless, Claimant's scores indicated that he distorted reality, may be indifferent to the

needs of others, and had a marked suspicion of authority figures. He is likely to try to outwit others but act impulsively and without planning. Dr. Gale noted that others with this profile often take actions resulting in legal problems.

32(f). To determine adaptive living skills, Dr. Gale used the Scales of Independent Behavior-Revised, a questionnaire given to Claimant's mother. She scored Claimant as having limitations in 12 out of 14 areas, the lowest being functional independence and social interaction skills. Dr. Gale also noted various behavior problems, including disruptive, anti-social and unlawful behaviors, lying, and excessive eating and sleeping.

32(g). Dr. Gale concluded that Claimant did not have mental retardation or autism, and that his developmental history suggested that he may have once met criteria for Pervasive Developmental Disorder-Not Otherwise Specified. Educational programs provided Claimant with adequate, but not fully independent, academic abilities. Atypical personality development was not treated appropriately, and Claimant might benefit from the use of strategies to help develop greater levels of insight, comprehension, and understanding of consequences. Dr. Gale felt the most appropriate diagnosis was Asperger's Syndrome, noting that, although verbal skills are usually a strength for such individuals in their early years, Claimant's initial language delays did not rule out the diagnosis because the other diagnostic factors were present. Dr. Gale also noted that Claimant's behavior can, in many ways, be viewed as fitting within the fifth category, as he has needs that are similar to those diagnosed with mental retardation and is likely to benefit from the training afforded to such individuals. He recommended referral to a regional center. Dr. Gale opined that Claimant most likely does not understand his legal situation and was unlikely to be able to aid in his own defense. Jail time would be unlikely to reduce recidivism. Rather, Dr. Gale recommended a comprehensive intensive outpatient program in his own living situation, not a residential placement, including male staff available 24 hours per day, 7 days per week, with special training to address Claimant's deficits, personality traits, learning and communication styles and behaviors.

32(h). Dr. Gale's later report and testimony are discussed below.

33. Based on Dr. Gale's referral, a psychosocial assessment was prepared by intake counselor Erica Reimer for the Service Agency on April 22, 2010 (Exhibit 5). New information provided in this report is that Claimant moved from Devereux in Santa Barbara into his mother's condominium in Pasadena in November 2009 and, in March 2010, he moved into an apartment in Culver City with 24/7 support provided by Independent Solutions, funded by his trust. Information was supplied by Claimant, a person from Independent Solutions, and review of unspecified records. The report noted that Claimant established eye contact, stated he did not have any friends, expressed interests in movies and superheroes, and stated he is flexible with his schedule but likes only certain movies and would not change his "taste" in movies. Claimant reported that he can budget, do his own shopping and cooking, can drive but does not have a car, and relied on staff to drive him. He did not need reminders for hygiene tasks. Sometime in this period Claimant was diagnosed with diabetes.

34(a). On May 18, 2010, a psychological consultation was performed by Thompson

Kelly, Ph.D., a staff psychologist for the Service Agency. His report is Exhibit C-3. Dr. Kelly testified at the hearing. By virtue of his experience, training and education, Dr. Kelly is qualified to render his opinions as noted below. Dr. Kelly was aware of the assessments and testing by Dr. Lewis and Dr. Gale and decided not to repeat them. Rather, he would observe Claimant and do an interview involving the Autistic Diagnostic Observation Schedule Module 4 (ADOS-4), which was also observed by a multidisciplinary team composed of another psychologist, a physician, a speech therapist and an occupational therapist who were experienced in eligibility determinations. The rest of the team observed Dr. Kelly and Claimant through a two-way mirror.

34(b). Claimant was accompanied by a care giver. He smiled and made eye contact with Dr. Kelly, and was asked about current activities and background history. Although not working Claimant was interested in finding some type of employment. He stated his 24-hour care and monitoring was required as the result of recent legal involvement that he noted he would rather not discuss. Although he had driven himself in the past, he gave his car to his mother but did not elaborate on why. Claimant discussed cooking and shopping. When asked how the regional center might be able to help him, Claimant stated that he and his mother wanted assistance with his care staff and to help him find a job.

34(c). When asked about social experiences or difficulties, Claimant commented that he gets along with people, his current mood was "alright" and he does not get depressed, angry or sad. His current interests were television reality shows and movies. Although he had dated a woman for three years, he had no serious relationships since high school and would be interested in developing one. He had no friends, just acquaintances and kept in touch with people from high school.

34(d). When asked about future hopes and plans, Claimant repeated that he wanted a job and to get off probation and not have people supervising him all the time. When Dr. Kelly noted that Claimant had not seen much of California, Claimant replied he would like to see more, was planning a trip to Las Vegas, would drive there and, if he didn't know the directions, he'd use a GPS device.

34(e). After Dr. Kelly and the multidisciplinary team scored the observation separately, and scores in both the domains of Communication and Reciprocal Social Interaction were below the cut-off to be suggestive of an autism spectrum diagnosis. Dr. Kelly commented that Claimant participated in a reciprocal conversation on a range of topics and answered questions posed to him appropriately. He engaged in eye contact, incorporated a variety of nonverbal gestures such as shrugging his shoulders and shaking and nodding his head, and displayed a range of facial expressions such as smiling and grimacing. There was no display of idiosyncratic or stereotyped verbal or physical mannerisms consistent with a diagnosis of autism such as whole body rocking, finger posturing or echolalia. Although Claimant's social presentation and overall quality of rapport was noted to be somewhat awkward at times, it was not suggestive of a diagnosis of autism. The team thought that Claimant's lack of insight, lack of responsibility for his actions and social awkwardness appeared to be more attributable to a potential mental health condition, in particular a possible personality disorder. There was no

formal diagnosis since their purpose was to assess for the presence of an autism spectrum diagnosis. "The consensus of the team was that Ronald did not appear to meet formal diagnostic criteria for a diagnosis of an Autistic Disorder," and although it could be argued he may be an individual on the spectrum, "it was believed given his current presentation that he would appear as an individual somewhat mild on that spectrum." (Exhibit C-3.)

34(f). Dr. Kelly testified that the multidisciplinary team and the ADOS-4 were used because the question of eligibility looked complex and because there were reports of recent testing and evaluations. The ADOS-4 is primarily a directed interview to elicit conversation and evaluate the quality of the subject's social interactions, communication, reciprocity, and insight into emotions. In his experience, someone with autism has an inability to shift topics, a continued fascination with certain limited topics, rigidity of thought, perseverative thinking and atypical physical mannerisms. He did not see these present in Claimant to a level of clinical significance. Dr. Kelly was aware of Dr. Lewis's diagnosis of autism but did not believe there was sufficient explanation of the basis for that conclusion. Dr. Kelly believed the test results obtained by Dr. Lewis, which indicated verbal comprehension in the upper level of borderline and higher scores for vocabulary, as being inconsistent with a diagnosis of autism. While Dr. Kelly agreed with Dr. Lewis that Claimant needed social skills training, he did not agree with Dr. Lewis's recommendation that, due to cognitive deficits, instruction should be broken down to short, concrete terms in time-limited sessions. He agreed with Dr. Lewis that Claimant had deficits in activities of daily living and in developing appropriate interpersonal boundaries. Dr. Kelly reviewed the Harding Hospital evaluation from 1993 (Exhibit C-7) and opined that it appeared more indicative of a person with a thought disturbance or personality disturbance than one with mental retardation or autism.

35(g). On cross-examination, Dr. Kelly was asked to explain certain aspects of eligibility under the fifth category. He gave his opinion that these are case-by-case determinations, often focused on the individual's development, what has factored into their delays, and to what extent the individual is substantially handicapped, while being aware of other factors, for example mental health conditions, that may contribute to the handicap. He referred to one essential question to be addressed – does the person present as having a condition similar to mental retardation. He stated further that he would have difficulty finding eligibility just based on the person's service needs, noting that many people, whether eligible or not under the Lanterman Act, could benefit from services. Dr. Kelly also made a distinction between services and treatment, noting that some services such as occupational therapy and physical therapy are provided by licensed professionals and are in the nature of treatment, while other services, such as respite and independent living programs, are support services but not treatments, and that respite is not even provided directly for the benefit of a consumer but, rather, for the benefit of a consumer's family. An individual with a Pervasive Developmental Disorder, not Autistic Disorder, may have suffered impaired neurological development such that, despite the ability to communicate, there may be profound and pervasive affects on daily functioning. For that reason, the individual may need a service, such as a day program like someone who has mental retardation. The effect of Dr. Kelly's testimony is that the type of case-by-case determination he described makes it difficult to state, with certainty and in a vacuum, a comprehensive list of factors that would qualify an individual as eligible under the

fifth category. According to Dr. Kelly, his consultation focused on Dr. Gale's diagnosis of Autism Spectrum Disorder and the suggestion that this diagnosis might make Claimant eligible under the fifth category.

35(h). Dr. Kelly was aware that Claimant received 24-hour care and supervision, but believed that he could probably be more independent. Dr. Kelly was aware of regional center consumers with IQ's significantly lower than Claimant who are able to function more independently and who receive some hours per week of independent living services.

35(i). According to Dr. Kelly, the usual administration of the ADOS takes about one and one-half hours to two hours, but his interview of Claimant was about 45 minutes. He probably did not follow the script word-for-word. He felt there were adequate prior tests results and other written information available, and was aware that Claimant's self-reporting of his abilities may have been overstated. Dr. Kelly was more interested in Claimant's overall presentation. While Dr. Kelly believed that Claimant's condition had begun prior to age 18 and was likely to continue, and that he was substantially handicapped, he also opined that there was no eligible developmental disability as required under the Lanterman Act.

35(j). Dr. Kelly was aware of the best practices guidelines for evaluating Autism Spectrum Disorders (Exhibit C-31), stating these were guidelines with a lot of room for interpretation. He was not aware if the ADOS was required under the guidelines, but believed it to be a good observational tool, whereas the Autism Diagnostic Interview-Revised (ADIR) was a lengthy clinical interview that he did not administer in this case. Although administering only the ADOS would not be best practices, Dr. Kelly believed that there had been sufficient, recent testing and data collected. He was familiar with Dr. Gale and thought his assessment was comprehensive, but Dr. Kelly did not agree with his conclusion. Dr. Kelly described the scoring for the ADOS, and that each team member scored the ADOS of Claimant separately, and then discussed their results. Dr. Kelly recalled that there was a consensus that Claimant was close to, but below the cut-off for autism spectrum disorder in the social domain, and well below the cut-off for autism.

35(k). Although Dr. Kelly considered that Claimant might have a perseverative interest in TV reality shows, Claimant was able to shift the discussion to other subjects. In Dr. Kelly's experience, the perseverative interest of individuals with autism are usually singular, very detailed, and to the exclusion of other interests. Claimant presented to Dr. Kelly with more than one interest, and Dr. Kelly was aware of other interests, such as superheroes and greeting cards, that were mentioned in other reports but not by Claimant to Dr. Kelly. Dr. Kelly's recommendations for services that would benefit Claimant included social skills training, but in a group setting, an adult education setting for daily living skills, and vocational assistance. Dr. Kelly is aware of the types of services provided to Service Agency clients who have been diagnosed with mental retardation. He did not see Claimant as being appropriate for the types of training usually provided to those with mental retardation, as he is much higher functioning.

36. According to his mother, Claimant settled into a routine in his Culver City apartment. She would see him often. He found a volunteer job at a senior center and learned

the bus route. Supervision was reduced to 20 – 22 hours per week, including such things as food shopping (as Claimant would not always select healthy items), reminders to fill his prescriptions and to maintain personal hygiene, transportation, and general reinforcement for Claimant to accomplish activities of daily living. Supervision was reduced because the cost was high. At some point Claimant's mother hired an independent support person, a prior employee of a support agency, also to reduce the cost. In May 2010 Claimant began attending a group of adults with disabilities organized by Dr. Gale that meets twice per month at a restaurant for the purposes of a community outing, social skills training and reinforcement, and professional feedback, known as the LUNCH program. Starting in September 2010, Dr. Gale has had therapy sessions with Claimant, once or twice per month that are about 25 minutes long.

37(a). For purposes of further evaluation, Claimant's mother and his attorney requested that a further assessment be performed by Dr. Gale, in conjunction with Pegeen Cronin, Ph.D., who also testified at the hearing. By virtue of her training, education and experience, Dr. Cronin is qualified to render expert opinions. Further assessments were performed in January 2011 and a joint report was issued, dated February 21, 2011 (Exhibit C-1).

37(b). In between Dr. Gale's two reports, Claimant had entered the LUNCH program and started therapy with Dr. Gale. Dr. Cronin reviewed Dr. Gale's earlier report and administered the ADOS-4 to Claimant (observed by Dr. Gale), and the ADI-R to Claimant's mother, with Dr. Gale listening to the phone conference. Dr. Cronin prepared the portions of their joint report related to the ADOS and ADI-R.

37(c). The ADI-R is a structured interview that covers the subjects necessary to determine whether there is a presence of the symptoms of Autistic Disorder. Claimant's mother provided a comprehensive history, much of which is summarized elsewhere in this Decision. Many of the conclusions noted below were supported by examples derived from the interview.

37(d). Dr. Cronin noted that although Claimant currently demonstrated adequate gaze, accompanied by gestures, he also demonstrated an extremely flat facial expression, and from an early age he had not demonstrated a range of facial expressions. Although he had significant early language delay, he did not incorporate and initiate other communicative strategies in an attempt to makes his needs known. While Claimant demonstrates fluent speech, he does not engage in reciprocal conversations unless they pertain to his restricted interests such as movies or related topics. He has learned to engage in some small talk, but it is marked by inappropriate or tangential comments, and Claimant might appear rude, not reading the social cues. Claimant has not demonstrated shared enjoyment for interests and activities. He never demonstrated spontaneous imitation of actions that then develop into imaginative play. Claimant has a long-standing history of repetitive use of objects. He has a significant history that persists for repetitive behaviors and circumscribed interests. Based on the ADI-R, Dr. Cronin concluded that Claimant has demonstrated delays and deviances in development for communication, reciprocal social interaction, and restricted, repetitive behaviors consistent with the diagnosis of Autistic Disorder.

37(e). Claimant's performance on the ADOS evinced the following comments from Dr. Cronin. In the area of communication, Claimant demonstrated limited abilities to engage in conversation, and while he engaged in facial gestures and eye gaze, his expression was flat. He provided either too much or not enough information. He often followed his own train of thought on restricted topics or abruptly changed topics, and did not build on the examiner's comments, or ask about the examiner's perspective, despite being prompted to do so. Claimant did not demonstrate insight or abstract reasoning and was very limited in his ability to understand and converse on the subjects of his friendships or describe his experience of feelings.

37(f). Dr. Gale's portion of the report focused on his further interactions with Claimant in the LUNCH program and individual therapy sessions. The LUNCH program focuses on the following areas of functioning: (1) executive functioning, including planning, organization, emotional control, self-monitoring, effective judgment, and working memory, formulating coping strategies, and accepting feedback; (2) social language skills, for example, effective conversations, speaking in a manner that fits the social situation (e.g., giving information without prompting, adjusting language usage to the audience being addressed); (3) social competence, such as reading social cues, perspective-taking, remaining on topic, knowing when to "jump in" to a discussion, modulating voice level for different situations; (4) vocational readiness, for example, remaining seated, effective hand-raising, recognizing what is appropriate conversation and social boundaries for the community or the workplace; and (5) behavior, such as pedestrian safety and behaving effectively in community settings.

37(g). Dr. Gale noted that Claimant was an exception to the rest of the group, in that he remains silent unless engaged in one of his favored topics. He will only respond with a perfunctory answer when asked questions by others. In individual sessions, Claimant demonstrated an indifference to budgeting money and stated he did not understand the relevance of questions related to money, as his trust fund or family would pay for things. He stated that he could easily manage his own money and health concerns, while demonstrating an inability to either discuss how he would do so or any history of having done so successfully.

37(h). Combining the information from records reviewed, prior assessments, the ADOS and ADI-R along with multiple observations, Dr. Gale and Dr. Cronin concluded that Claimant met the diagnostic criteria for Autistic Disorder. More specifically, they found clinically significant evidence of: all four of the symptoms or behaviors described as qualitative impairment of social interaction (that is, (1) marked impairment in use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expressions, body postures and gestures to regulate social interaction; (2) failure to develop peer relationships appropriate to developmental level; (3) lack of spontaneous seeking to share enjoyment, interests or achievements with others, e.g. by a lack of showing, bringing, or pointing out objects of interest; and (d) lack of social or emotional reciprocity); three of the four symptoms or behaviors described as qualitative impairments in communication (that is, (1) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime); (2) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others; and

(3) lack of varied, spontaneous make-believe play or social imaginative play appropriate to developmental level); and three of the four symptoms or behaviors described as restrictive, repetitive and stereotyped patterns of behavior, interests and activities (that is, (1) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus; (2) apparently inflexible adherence to specific, nonfunctional routines or rituals; and (3) persistent preoccupation with parts of objects). They also found delays or abnormal functioning in at least one of the following areas, with onset prior to age three years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play. In their opinions, Claimant is substantially disabled in his level of self-care, learning abilities, self-direction, capacity for independent living, and economic self-sufficiency. In addition, they opine that Claimant evidences a disabling condition that requires treatment that is similar to that required for individuals with mild mental retardation and is eligible for services under autism or the fifth category.

38(a). In his testimony, Dr. Gale provided additional information and opinions. He stated that Claimant was not an accurate reporter of his history and behaviors. He was contradictory, for example being secretive about giving information he had learned and then telling people where to find that information. Dr. Gale referred to Claimant's giving of information as "slippery," meaning he did not give full information or the most responsive information. Unless the conversation links to his interests or obsessions, Claimant doesn't really converse; rather, he will talk but not give much information or engage in a reciprocal exchange. For example, he can maintain a conversation on his subjects of interest, which are movies, television reality shows, Facebook updates and communication, games, Las Vegas and people who irritate him. But on other subjects, such as managing his diabetes, his participation is short and he will not address serious or alarming aspects of the subject. Even in favored subjects, such as movies, Claimant's interests are very proscribed. He will discuss titles and actors, but not plot or other participants. When Claimant was working, he was very rigid about his schedule, and was not able to accommodate a change in schedule that interfered with television shows he wanted to see. His multiple items of interest are not like hobbies, where you can learn and improve. Rather, they are very repetitive, don't promote social interaction, and are more like self-stimulatory behavior using objects.

38(b). Claimant's eye contact is atypical, perhaps due to a prior cataract and surgery, but it also demonstrates an unusual intensity, or no contact at all. His non-verbal gestures are also atypical – he will use his hands, nod his head and use facial expressions, but Claimant rarely demonstrates an emotional connection to show concern, sympathy or remorse.

38(c). Dr. Gale disagrees with Dr. Kelly's reference to a possible personality disorder, as Claimant does not meet the criteria for the ten personality disorders of which Dr. Gale is aware, although he has some elements of some of those disorders. Dr. Gale gave examples of some behaviors of Claimant that meet some, but not all, of the diagnostic criteria for these personality disorders, including the statement that many people exhibit some of these same behaviors. In an effort to gather information on possible personality disorders, Dr. Gale administered the Millon Clinical Multi-Axial Inventory (MCMI-III) (see Factual Finding 32(e)), with the result that there was no diagnosis on Axis II, where a personality disorder

would be referenced. Dr. Gale does not see Claimant's presentation as reflective of a personality or psychiatric disorder or a mental illness. It is more global.

38(d). Dr. Gale found that Claimant may reach conclusions on limited or incorrect information yet is very dogmatic and will not change that conclusion. He shows a lack of need for closeness such as in a friendship, and Dr. Gale is not aware of any initiative by Claimant to arrange an activity with others. "He talks about a life he is not living." He doesn't think about being in a society, goes his own way until there is a conflict or obstruction, and doesn't think about consequences or review a situation as a learning experience or engage in self-reflection. As a result of not demonstrating this higher order of thinking, he does not care if his judgments or actions are helpful or harmful, and many are harmful.

38(e). Dr. Gale described a series of events starting with Claimant's family's concerns about his internet activity. As a result, his brother installed a Net Nanny program to track and limit access to certain internet sites. Claimant went to a Best Buy store, perhaps several times, and learned how to disable it. Dr. Gale did not perceive this as demonstrating a higher level of cognitive skill and planning. Rather, he saw it as an example of how Claimant can become motivated when he wants to get out of something.

38(f). Dr. Gale agreed that a person's IQ generally does not change over time, but addressed the decline in Claimant's IQ scores as follows. First, the data was not always present or consistent in support of the IQ scores obtained for Claimant, and the prior IQ scores were often not consistent with the descriptions of Claimant in the same time period. Also, he described the Flynn effect, whereby IQ scores can be expected to decline over time, in part based upon the period of time when the scores were standardized and later administrations of the same test to populations that may have increases in their intelligence. Further, tests were revised and Claimant was administered different tests, and different versions of tests, over time. As a result, he believes that older IQ scores can be viewed with caution.

38(g). Dr. Gale addressed the differences in his initial conclusion that Claimant met the criteria for Asperger's Syndrome, and his later conclusion that the proper diagnosis is Autistic Disorder. He stated that, from their first meeting, it was hard for Dr. Gale to understand the direction that Claimant's symptoms were pointing. The prior testing demonstrated several areas of impairment, some significant and some less so, but with a scattered profile. He did not at first agree with Dr. Lewis's diagnosis of autism because of Claimant's verbal abilities and ability to make eye contact. Further, Dr. Gale's focus was primarily to give advice on the issue of jail or probation, and not on gathering all of the information necessary for a diagnosis. Nevertheless, Dr. Gale concluded that Claimant suffered from a developmental disability and was able to suggest that placing Claimant in jail would be harmful or useless. At the time, he concluded that due to Claimant's language progress between the ages of three and five, his presentation was not indicative of autism. In his first assessment, he suggested eligibility under the fifth category. Later, more information was gathered. He was not experienced with the ADOS and observed Dr. Cronin's administration of it and the ADI-R. Dr. Cronin did a more thorough assessment in this targeted area and her findings were consistent with Dr. Gale's observations.

38(h). On the subject of the severity of Claimant's disability as related to the eligibility requirements, Dr. Gale concluded that Claimant has substantial functional limitations in self-care, although he also had many acceptable behaviors in this area. Similarly in the subject of receptive and expressive language, Claimant demonstrated some strengths and abilities, but his deficits make his overall presentation as borderline. Claimant has some strengths in learning and self-direction, but his deficits create significant limitations for him. His capacity for independent living is definitely impaired. His capacity for economic self-sufficiency is also impaired. Claimant demonstrated unusual variations in the categories of dysfunction, but they were still dysfunctions.

38(i). Dr. Gale concluded that Claimant's adaptive functioning was comparable to someone with mild mental retardation. His condition has aspects that are similar to mental retardation, and Claimant requires treatment similar to those with mental retardation, such as training in money management, cooking, hygiene, vocational opportunities and strategies, with feedback and monitoring, independent living skills, but more targeted than in other cases. His working memory is poor, so training should be broken into segments. He requires education on medical conditions, health and exercise, as well as social skills training.

39(a). Dr. Cronin testified that she has performed thousands of evaluations for the purpose of determining the presence of a developmental disability. Most of these have been as part of a team while working at UCLA, where the emphasis is more on evaluation and initial treatment recommendations and family support than on continuing treatment. She was part of the group that worked on the Best Practices guidelines. She was asked about criticism expressed by Dr. Kelly concerning the high rate of autism diagnoses she has made. (Dr. Kelly specifically noted that he was aware of numerous instances wherein Dr. Cronin had made such a diagnosis of individuals that Dr. Kelly and others did not believe were autistic.) She explained that she sees a biased sample where there is already a suspicion of autism or she is asked to confirm the diagnosis after referrals have been made by pediatricians, psychologists or regional centers.

39(b). According to Dr. Cronin, best practices suggest using a comprehensive developmental history. The ADOS and the ADI-R are designed to map possible DSM-IV criteria. The ADOS is considered a "gold standard" as one of the sources of information for this purpose. She described the ADOS as a semi-structured social communication measure. It utilizes a script, with limited ability to vary from it without affecting validity of scores. She was aware of Dr. Gale's first report before she administered these measures and became aware of Dr. Lewis's report before she completed her portion of the joint report with Dr. Gale. Dr. Cronin believed that information from Dr. Lewis's report and Dr. Gale's first report was comprehensive, and consistent with the information she received from the ADI-R.

39(c). Dr. Cronin gave examples of Claimant's responses and behaviors during the ADOS that supported her clinical impressions and are consistent with a diagnosis of autism, such as: peculiarities in Claimant's eye gaze and his extreme lack of use of facial expressions; although Claimant used gestures, they were not coordinated with eye contact in the conversation; his very idiosyncratic speech, both for manner and subject; and his lack of

relatedness and reciprocity. She noted that Claimant thinks he is giving you information, but he is not. She did not see physical mannerisms that are typical of individuals with autism.

39(d). When asked if Claimant distorted information, she opined that it was more of a disconnect or lack of insight and gave examples. Regarding the question of eligibility and whether Claimant is substantially disabled, she noted that he has some strengths such as mobility and some self-care skills, but is severely disabled in the areas of economic self-sufficiency and independent living.

39(e). Dr. Cronin had been asked to review other reports in preparation for her testimony and was aware of Dr. Kelly's report. She noted the report was titled as a consultation, not a full assessment, and that best practices would be to consult more sources of information than indicated in the report. Based on her familiarity with the ADOS, she stated it appeared that Dr. Kelly combined an abreviated ADOS with additional interview subject matter, such as might be covered in an intake interview. She also noted no mention of some of the elements included in the ADOS (e.g., picture book, create a story, demonstrate a task). She was not sure that the fidelity of the ADOS was maintained. She also noted that Dr. Kelly's mention of a mental health issue (personality disorder) was not determinative, as this can be co-morbid with autism. Nevertheless, she would not characterize Claimant as having a personality disorder

40. For the reasons more specifically set forth in the Discussion below, the opinions of Doctors Lewis, Gale and Cronin, to the effect that Claimant is eligible for services from the Service Agency, are entitled to more weight than the opinion of Dr. Kelly and others who did not find that Claimant suffers from a developmental disability. The preponderance of the evidence submitted favors the determination that Claimant is eligible for services from the Service Agency. Therefore, Claimant's appeal of the Service Agency's decision to deny eligibility for Claimant to receive services is granted.

CONCLUSIONS OF LAW AND DISCUSSION

Pursuant to the foregoing factual findings, the Administrative Law Judge makes the following conclusions of law and determination of issues:

1. Throughout the applicable statutes and regulations (Welfare & Institutions Code sections 4700 - 4716, and California Code of Regulations, title 17, sections 50900 - 50964), the state level fair hearing is referred to as an appeal of the regional center's decision. Particularly in this instance, where Claimant seeks to establish his eligibility for services, the burden is on the appealing Claimant to demonstrate that the Service Agency's decision is incorrect.

2. To answer the question of Claimant's eligibility requires a review of the applicable statutes and regulations, and the relationship of the evidence to them. At any point, a failure to satisfy a requirement will result in a conclusion of no eligibility. If all requirements are satisfied, eligibility is found, unless the regional center proves an exclusion from eligibility.

In other words, a developmental disability must exist. If it is determined that Claimant's condition fits in a category of eligibility, it must also be a substantial disability or handicap, and must not be solely from an excluded condition.

3. Welfare & Institutions Code section 4512 lists specific categories for possible eligibility, including autism and the fifth category as including disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation. (See Factual Finding 4.)

4. There have been numerous tests, evaluations, assessments and reports relating to Claimant. Numerous factors have been identified and discussed which may legitimately play a part in the determination of whether Claimant suffers from a developmental disability. Some results are consistent and clear, while others appear to be preliminary or speculative or have not been supported by other evaluations. There has often been reference to learning disabilities (see Factual Findings 13, 14, 22 and 29) as well as distractibility or Attention Deficit Disorder (Factual Findings 12, 14, 17, 22, 15, 29 and 31), neither of which would make Claimant eligible for services under the Lanterman Act. There is also a lack of consistency to many of the findings or observations over time. For example, some prior testing and observations have found that Claimant exhibits good hand-eye coordination (Factual Finding 22), while others note this is a weakness (Factual Finding 16). Similarly, on math and arithmetic subtests, Claimant has scored adequately in some instances (Factual Findings 16 and 17) and poorly in others (Factual Finding 22). Social skills are often seen as a deficit (Factual Finding 25, 31, 33 and 39), but some social skills are effective (Factual Findings 22 and 25). Verbal skills are noted as appropriate or strong in some instances (Factual Findings 12, 31, 34 and 38) and weak in others (Factual Findings 22, 26, 31, 37 and 38). Some evaluations fault Claimant's ability to carry out plans or stay organized (Factual Findings 16, 23 and 31), yet he was able to hold jobs and take organized steps, over time, to steal money from another student and disable an internet filter (Factual Findings 23, 24, 28, 29 and 38).

5. Considering such varying test results, observations and behaviors over such a long period of time, the opinions of qualified experts become crucial. There is no question that Dr. Kelly, Dr. Lewis, Dr. Gale and Dr. Cronin are well qualified to evaluate people to determine whether to make a diagnosis of autism under the DSM-IV-TR. There is also evidence that would have an effect on the weight to be given to their conclusions (for example, Dr. Gale's somewhat inconsistent conclusions over his two reports; Dr. Cronin's finding of an eligible developmental disability in an overwhelming majority of cases; and Dr. Kelly's modification of the ADOS he administered to Claimant). The reports prepared by Dr. Lewis, Dr. Gale and Dr. Cronin were specific and comprehensive, and there was testimony to explain and support their findings and conclusions. Dr. Kelly was an important component of the Service Agency's eligibility team, but he noted that some documents related to Claimant's development and medical history were reviewed in detail by a physician who was a member of the team, and that there was additional input by the group that observed his administration of the ADOS, whose experience was only established in the most general way. Dr. Kelly's ADOS was less rigorous than the one performed by Dr. Cronin, and Dr. Kelly did not have the benefit of a contemporaneous ADI-R, although he was aware of Dr. Lewis's report, which everyone

considered to be comprehensive and current.

6. To be sure, Dr. Kelly made observations and issued a report that was justified by the information he gathered and the observations he made, and his testimony was clear and supported his conclusion that Claimant does not suffer from a developmental disability. However, Dr. Gale and Dr. Cronin had the benefit of more information, more time spent observing and interacting with Claimant, and a process that was likely to yield a valid and supportable diagnosis. In conjunction with the assessment and report of Dr. Lewis, as well as the other information in the record, there is sufficient evidence to conclude that Claimant satisfies the eligibility requirements for services under the Lanterman Act. (See Factual Findings 4 through 40.)

7. Based on the foregoing, no conclusion is required on Claimant's contention that he is eligible because he has mental retardation or that he is eligible for services under either the regular language of the fifth category or under an expanded definition or application of the fifth category that would include a condition closely related to mental retardation or autism or that requires treatment similar to that required for individuals with mental retardation or autism

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant has established his eligibility for services. Claimant's appeal of the Service Agency's determination that he is not eligible for services from the Service Agency is granted.

DATED: December 6, 2011.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.